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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. SAMUEL NWABUEZE, Defendant.	NO. CR 10-411-MMM **MEMORANDUM OF POINTS AND AUTHORITIES RE: LEGAL STANDARD FOR DETENTION UNDER 18 U.S.C. § 3142**

Defendant, Samuel Nwabueze, Jr., through his counsel of record, Deputy Federal Public Defender Carlton F. Gunn, hereby files the attached memorandum of points and authorities regarding the legal standard for detention under 18 U.S.C. § 3142, which the defense submits was misapplied by the magistrate in this case.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: June 9, 2010

By /S/
CARLTON F. GUNN
Deputy Federal Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Two issues are presented in deciding whether to detain a defendant. One is the legal question of what risks may justify detention. The other is the factual question of whether such a risk is then shown by the government, which is the party that bears the burden of proof.

This memorandum of points and authorities is filed to address the first of these issues – the legal question – in part because the defense believes that the magistrate erred on this question. In making his ruling, after taking a lengthy recess to review the Ninth Circuit case of *United States v. Twine*, 344 F.3d 987 (9th Cir. 2003), the magistrate explained his ultimate denial of bail as follows:

> I've taken a look at *United States v. Twine* and the circuit cases that it cited and it certainly suggests that in this instance it's the flight risk that I should be directing my attention to. I'm going to deny the motion for reconsideration based on my finding that, even though the defendant has a history of showing up for trial, the record shows an inability to comply with conditions. He was on parole at the time of the alleged violation here and under these circumstances I just find that the bail resources that have been offered are inadequate. So, I'm denying the motion for reconsideration.

Exhibit A (transcript of detention hearing), at 10.[1]

[1] Exhibit A is an unofficial transcript initially prepared by defense counsel's secretary and proofread and edited by defense counsel. Defense counsel will have the actual recording from the detention hearing in court if there is any dispute about the accuracy of this transcript.

In basing detention on "an inability to comply with conditions," rather than the likelihood that Mr. Nwabueze would make his court appearances, the magistrate based his decision on a risk that is not a risk upon which 18 U.S.C. § 3142 allows detention to be based. In the case of economic crimes such as those with which Mr. Nwabueze is charged, the only risks upon which detention may be based are flight risk and any risk there may be that the defendant will obstruct or attempt to obstruct justice. Non-compliance with conditions is a risk that can justify detention only when a court is considering *revocation* of release. The magistrate therefore erred in detaining Mr. Nwabueze.

II.
ARGUMENT

The basic standard for deciding whether to initially detain a defendant is set forth in 18 U.S.C. § 3142(e). That subsection provides for detention only if the court "finds no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(e). Conversely, subsection (c) requires *release* "subject to the least restrictive further condition, or combination of conditions, that [the] judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(c)(1)(B). Further, subsection (f), which governs when detention may be requested, limits the cases in which danger to community may be a basis for detention by allowing the threshold request to be based on danger only when the charged offense falls within certain categories of crimes that do not include economic crimes such as those with which Mr. Nwabueze is charged. *See United States v. Twine*, 344 F.3d 987 (9th Cir. 2003) *and cases cited therein*; *see also United States v. Salerno*, 481 U.S. 739, 750 (1987) (noting that Bail Reform Act provision allowing detention

based on dangerousness "operates only on individuals who have been arrested for a specific category of extremely serious offenses").

Nowhere does § 3142 allow the initial detention decision to be based on the risk the magistrate relied on at Mr. Nwabueze's revocation hearing, namely, "an inability to comply with conditions," *supra* p. 2. And the silence of § 3142 on this point contrasts with the statute governing *revocation* of release – 18 U.S.C. § 3148(b). That section of the Bail Reform Act, which applies to the revocation of release previously granted, reads as follows:

> The judicial officer shall enter an order of revocation and detention if, after a hearing, the judicial officer –
>
> (1) finds that there is –
>
> (A) probable cause to believe that the person has committed a Federal, State, or local crime while on release; or
>
> (B) clear and convincing evidence that the person has violated any other condition of release; and
>
> (2) finds that –
>
> (A) based on the factors set forth in section 3142(g) of this title, there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community; *or*
>
> (B) *the person is unlikely to abide by any condition or combination of conditions of release.*

18 U.S.C. § 3148(b) (emphasis added).

This difference between 18 U.S.C. § 3148(b) and 18 U.S.C. § 3142 triggers the

familiar principle of statutory construction that when Congress expressly includes language in one section of a statute and fails to include it in another, the failure to include the language in the second section is presumed to be deliberate. *E.g.*, *In the Matter of Consolidated Freightways Corp. of Delaware*, 564 F.3d 1161, 1165 (9th Cir. 2009) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)). Congress's inclusion of the option of detention based on the likelihood of failure to comply with conditions in § 3148 and its failure to include that option in § 3142 means the possibility of failure to comply with conditions cannot be a basis for the initial detention decision. It can only be a basis for detention after the defendant has been released and actually violated conditions.

This is not an irrational distinction, moreover. Any prediction of future behavior is necessarily uncertain and carries a risk of error, which in the detention context means the erroneous deprivation of liberty. *Cf. Salerno*, 481 U.S. at 750-51 (acknowledging "the individual's strong interest in liberty" but holding that "this right may, *in circumstances where the government's interest is sufficiently weighty*, be subordinated to the greater needs of society" (emphasis added)). Where the future behavior of concern is that the defendant will not appear in court at all, or might obstruct justice and thereby wrongfully avoid conviction, there is no way to cure the harm after the fact because the defendant is gone – if he has fled – or mistakenly acquitted – if he successfully obstructs justice. Where the future behavior of concern is that the defendant will violate a condition of release, but still be present for prosecution, with the same untainted evidence against him that existed at the start, the harm is not so irreversible, because the defendant is present to be remanded and the evidence still there to convict him. Tilting the balance against trying to predict the future unless there is actual misbehavior in the case at hand is therefore appropriate.

In sum, there are both statutory construction and policy reasons for limiting the

initial detention decision to a focus on the particular concerns of flight risk, obstruction of justice, and, in a limited number of the most serious cases, criminal behavior. Detention based on concerns about non-compliance with conditions is – and should be – more limited.

III.

CONCLUSION

The magistrate erred in detaining Mr. Nwabueze based on "an inability to comply with conditions." The only basis for detention in a case such as the present one is flight risk or a risk that the defendant will obstruct or attempt to obstruct justice. Given the magistrate's failure to find either of these risks, Mr. Nwabueze should have been released on conditions.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: June 9, 2010

By /S/
CARLTON F. GUNN
Deputy Federal Public Defender